

COUNCIL POLICY**CURRENT**

SUBJECT:	HEARING PROCEDURES FOR PROTESTS OF CONTRACT SELECTION OR NON-RESPONSIBILITY DESIGNATION
POLICY NO.:	000-29
EFFECTIVE DATE:	January 11, 2005

BACKGROUND:

The City's primary objective when awarding *Contracts* is to use fair and unbiased selection procedures.

PURPOSE:

This policy establishes hearing procedures to resolve protest of *Contract Selection* or designation of *Bidders* as *Non-Responsible*.

DEFINITIONS:

Announcement – means the declaration of the intent to *award a contract* or a *public works contract*, by any means of transmission, including U.S. mailing, automated phone message or Internet posting. The effective date of an *announcement* by mail is the date that the *announcement* is deposited in the U.S. mail.

Award – means the acceptance of a bid or proposal by the City's authorized representative.

Bidder – means a *Person* who has submitted a bid, proposal, or other document seeking *award* of a *contract*.

City Manager – means the *City Manager*, Assistant *City Manager*, Deputy *City Manager*, or any public officer designated by the *City Manager*.

Consultant – includes providers of expert or professional *services* and excludes providers of *Services*.

Contract – means any *Purchasing Contract*, *Public Works Contract* or *Consultant* agreement to which the City is a party.

Contract Selection – means the City's selection of a *Bidder* to be awarded a *Contract*.

Contract for Goods – means an agreement between the City and another party in which the City is the purchaser of *Services*, excluding *Consultant services*. Maintenance *contracts* are *Contract for Services*.

Contract for Services - means an agreement between the City and another party in which the City is the purchaser of *services*, excluding *consultant services*. *Contract for Services* includes maintenance *contracts*.

Evaluation Team – means the City Team (consisting of one or more members) assembled to review and evaluate bids and proposals.

Goods – means any articles, commodities, materials, supplies, equipment, or insurance.

Interested Parties – means the *Bidder* selected for *Award* of a *Contract*, and any non-selected *Bidder*.

Non-Responsible - means a determination by the City that a *bidder* does not have the quality, fitness, and capacity to satisfactorily perform the work proposed in a *contract*.

Person – has the same meaning as that in San Diego Municipal Code section 11.0210.

Protest Body – means a panel appointed by the *City Manager* as needed to review evidence presented by all *interested parties* to determine whether the *evaluation team's contract selection* is in accordance with all applicable laws and guidelines.

Public Works Contract – means an agreement for the construction, reconstruction, or repair of public buildings, streets, utilities, and other public works.

Purchasing Contract – includes *Contract for Goods* and *Contract for Services*.

Requests for Bids (RFB) - means a City document that is advertised in the official City newspaper when required by law that contains *contract* provisions, specifications and procedures, and that invites bids.

Requests for Proposals (RFP) - means the City document that is advertised in the official City newspaper when required by law that contains *contract* provisions, specifications and procedures, and that invites proposals.

Responsible – means a determination by the City that a *bidder* has the quality, fitness, and capacity to satisfactorily perform the work proposed in a *contract*.

Responsiveness – means a *bidder's* compliance with the bidding instructions.

Services – means all work provided by persons other than *Consultants*, including work provided pursuant to maintenance *contracts*, but excluding the construction, reconstruction, or repair of public buildings, streets, utilities, or any other public works. Providing *Goods* does not constitute *Services*.

POLICY:

It is the policy of the City Council that a protest of the selection of a *Bidder* to be awarded a City *Contract* be heard by an objective body. To facilitate an objective forum, this policy establishes an administrative procedure to resolve such protests.

POLICY APPLICABILITY:

This policy applies to all *contracts* procured by RFB or RFP, except that it does not apply to (1) *contracts* with other public agencies; (2) *contracts* awarded by the City Council or *City Manager* on a non-competitive basis; or (3) *contracts* involving a transfer of an interest in real property including, but not limited to, a lease or a *contract* for sale.

PROCEDURE FOR PROTEST OF CONTRACT SELECTION:

1. Notice of Intent to Protest: A non-selected *bidder* may protest *award* to the selected *bidder* by submitting a written "Notice of Intent to Protest," which shall be received by the City Department administering the *contract award*, no later than ten calendar days after the City's *announcement* of the selected *bidder* or no later than ten calendar days from the date that the City issues notice of designation of a *bidder* as *non-responsible*. If the tenth calendar day falls on a weekend or City holiday, the protesting *bidder* may submit the Notice of Intent to Protest on the first work-day following such weekend or holiday. The City shall disclose the method of *announcement* to all *bidders* in the bid documents. Failure to file a timely Notice of Intent to Protest shall bar consideration of a protest.
2. Statement of Grounds for Protest: The Notice of Intent to Protest shall state all grounds claimed for the protest and include supporting documentation. Failure to clearly state the grounds for the protest and provide supporting documentation shall be deemed a waiver of all protest rights.
3. Review of Notice of Intent to Protest: The City Department administering the *contract award* shall review the Notice of Intent to Protest to determine whether it complies with San Diego Municipal Code section 22.3029(b) and whether the protesting *bidder* may request a *protest hearing* under San Diego Municipal Code section 22.3029(d).
- 3a. Grounds for Protest Hearing: A protesting *bidder* may present evidence at a *protest hearing* only when the alleged grounds for the protest are as follows: (1) The City failed to follow procedures or requirements specified in the *request for bids* or *request for proposals* or equivalent, including any amendments; (2) City employees or *evaluation team* members engaged in misconduct or impropriety; (3) the City's designation of the protesting *bidder* as *non-responsible* was incorrect.

- 3b. No Protest Hearing for Protest of Responsiveness: A protesting *bidder* shall not be entitled to a *protest hearing* to protest its own or another *bidder's Responsiveness*, however, the *City Manager* may allow a *bidder* designated as non-Responsive by the City Department to file a Formal Protest, pursuant to the Formal Protest procedures set forth under this Section, if the *City Manager* determines that a hearing is necessary to resolve a relevant factual issue that cannot be determined from the face of the bid documents.
- 3c. Designation of Bidders as Non-Responsible: When the *evaluation team* has determined that a *bidder* is *non-responsible*, the *City Manager* may elect to pursue debarment if the evidence that supports the *bidder's* designation as *non-responsible* also supports debarment. In the event that the *City Manager* elects to debar the *bidder*, the *City Manager* shall follow the notice and hearing procedures for debarment set forth in San Diego Municipal Code section 22.0801 *et seq.* In all other cases where the *evaluation team* has determined that a *bidder* is *non-responsible*, the *City Manager* will follow the notice and hearing procedures set forth in this policy.
4. Notice of City Determination: After review of a *bidder's* Notice of Intent to File a Protest, the City Department will provide written notice to the *bidder* of its determination, detailing the factual basis for the City's determination. Service of the City Department's determination shall be made in accordance with one of the methods listed in San Diego Municipal Code section 11.0301.
5. Formal Protest: If the *bidder* desires to continue its protest notwithstanding the City Department's determination, the *bidder* must submit a written Formal Protest, which shall be received by the City Department administering the *contract award* within ten calendar days of service of the City Department's determination. If the tenth calendar day falls on a weekend or City holiday, the protesting *bidder* may submit the Formal Protest on the first work day following such weekend or holiday. The Failure to file a timely written Formal Protest shall bar consideration of the Formal Protest.
6. Bid Protest Bond: The written Formal Protest shall include a detailed factual response to the City Department's determination, including all supporting documentation. The *bidder* shall also include a bid protest bond in the form of a surety bond from a California licensed surety, an irrevocable standby letter of credit, certified check, cashier's check or money order, made payable to the City of San Diego, in an amount set by ordinance. The bond format shall be in a format acceptable to the *City Manager*. The failure to clearly state the grounds for continuing the Formal Protest, or provide all supporting documentation or the bid bond shall be deemed a waiver of all protest rights.
7. City Manager Review of Formal Protest: The *City Manager* shall appoint a *Protest Body* and determine whether the grounds stated in the written Formal Protest meet the requirements for a hearing, as set forth in Section 3 of this Policy. The *Protest Body* will conduct the protest hearing in accordance with the procedure set forth, below. The *bidder's* failure to comply with Formal Protest procedures set forth

in the Policy approved by City Council shall bar further consideration of the *bidder's* Formal Protest.

- 7a. Protest Body: The *City Manager* may either appoint a panel to serve as the *Protest Body* or, alternatively, *contract* with the State of California Office of Administrative Hearings [OAH] for an Administrative Law Judge [ALJ] to serve as the *Protest Body*.
- 7b. Purchasing and Public Works Contracts: The *City Manager* may appoint a three member board to act as the *Protest Body*, including City management level employees who have not participated in the subject *bidder* selection or are not subject to the authority, direction, or discretion of personnel who have participated in the *bidder* selection. This standard may be accomplished by excluding division personnel as prospective members of the *Protest Body* when that division has rejected the *contract* that is the subject of a bid protest hearing. The *City Manager* will designate one member as chairperson.
- 7c. Consultant Agreements: The *City Manager* may appoint a five member board to act as the *Protest Body*, consisting of a representative of the Citizens' Equal Opportunity Commission, a representative from the public, and three other members who may be City employees that have not participated in the subject *bidder* selection or are subject to the authority, direction, or discretion of personnel who have participated in the *bidder* selection. This standard may be accomplished by excluding division personnel as prospective Board members when that division has rejected the *contract* that is the subject of a bid protest hearing. The *City Manager* will designate one member as chairperson.
- 7d. OAH as Protest Body: In the event that a protesting *bidder* seeks to disqualify a member of the *Protest Body* on the grounds of bias, prejudice, or interest, the *bidder* must submit a written request to the *City Manager* within five calendar days of receiving Notice of a Protest Hearing, stating the factual grounds for disqualification [Disqualification Request]. Based upon the *City Manager's* evaluation that the Disqualification Request has merit, the *City Manager* may replace the subject member of the *Protest Body* or *contract* with the OAH for an ALJ to serve as the *Protest Body*. Upon the request of the *City Manager*, and pursuant to its own internal procedures that are independent from those of the City, the OAH will select an ALJ to act as the *Protest Body*.
8. Notice of a Protest Hearing: Upon the appointment of a *Protest Body*, the *City Manager* will set a date, time, and location of the Protest Hearing. Unless all parties agree to a hearing date with shorter notice, the *Protest Body* will send written notice of the Protest Hearing to the protesting *bidder* not less than five working days before the Protest Hearing. The notice will disclose the names of the members of the *Protest Body* and the date, time and location of the Protest Hearing.
9. Presentation of Evidence: The *Protest Body* will hear evidence and arguments

from the *evaluation team* and *interested parties*, their witnesses or authorized representatives. Evidence may be oral or written, but any documents or written argument and the names and addresses of witnesses must be submitted to the *Protest Body*, and exchanged between the City Department administering the *contract award* and the protesting *bidder*, no later than three working days prior to the hearing date. Any information or evidence submitted after the deadline may be excluded by the *Protest Body*. The *protest body* need not be bound by the common law or statutory rules of evidence and procedure, but may make inquiries in the matter through all means and in a manner best calculated to make a just factual determination. If an ALJ is to act as the *protest body*, however, the City and the *bidder* may consent to follow the hearing adjudication procedure set forth in California Government Code sections 11500 et seq. (also known as the Administrative Procedure Act). The hearing shall be open to the public.

10. Record of Hearing: All hearings shall be tape recorded by the *City Manager*, however, any *interested party* may request that a certified stenographer record the hearing proceedings in lieu of a tape recording. The requestor of the certified stenographer will bear all recording costs and must provide a complete copy of the hearing transcript to the *protest body* without cost.
11. Decision: After review of all evidence and arguments presented, the *protest body* will render a final determination by a majority vote if the *protest body* is comprised of persons other than an ALJ. The *Protest body's* deliberations and consultation with its legal counsel shall be confidential. The *protest body* will issue its decision on the protest as expeditiously as possible, but no later than thirty calendar days after the protest hearing. The *protest body* will send written notification of the decision to all *Interested Parties*. Except for the protest of a *Consultant* agreement for an expenditure exceeding \$250,000, the *protest body* decision is final. A *protest body* decision on a protest of a *Consultant* agreement for an expenditure exceeding \$250,000 may be appealed to the City Council. This appeal shall be submitted in writing to the City department where the bid or proposal was originally submitted no later than ten calendar days after the date the *protest body* issues its decision. The City department will forward the appeal to the City Council. Failure to submit a timely appeal shall bar consideration of an appeal.
12. Decision Based Upon Evidence: The Hearing Board's decision shall be supported by findings which, in turn, shall be supported by the evidence presented at the hearing.
13. Burden and Standard of Proof: The protesting *bidder* shall bear the burden of proof of the factual basis for the protest by a preponderance of the evidence.
14. Costs paid by the Bidder: If the *protest body* upholds the determination of the City Department regarding the *award*, the *protest body*, at its discretion, may assess the City's costs of the Formal Protest hearing. The bidder shall then pay the assessed costs within thirty calendar days of service of the decision; otherwise, the City may deduct the assessed costs from the bid protest bond provided by the *bidder*. Any costs

assessed by the *protest body* in excess of the security shall be paid by the *bidder* within thirty calendar days of the *protest body*'s final determination concerning the *award*.

15. Final Decision Date: The decision of the *protest body* shall become final on the date of service of the decision, in accordance with one of the methods listed in Section 11.0301 of the San Diego Municipal Code.
16. Judicial Review of Final Decision: Judicial review of the *protest body*'s decision shall be governed by California Code of Civil Procedure 1094.5 *et seq.*
17. Protest may not Preclude Award or Rejection of Bids: The *bidder*'s filing of a Notice of Intent to File a Protest or written Formal Protest shall not preclude the *City Manager* from rejecting all bids and rebidding a *contract*.

HISTORY:

Adopted by Resolution R-285123 12/12/1994
Amended by Resolution R-293208 05/30/2000
Amended by Resolution R-296879 07/30/2002
Amended by Resolution R-300046 01/11/2005